

No. 14,548

IN THE

United States Court of Appeals
For the Ninth Circuit

WILLARD D. MCKINNEY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLEE.

LLOYD H. BURKE,

United States Attorney,

DONALD B. CONSTINE,

Assistant United States Attorney,

RICHARD H. FOSTER,

Assistant United States Attorney,

422 Post Office Building,

Seventh and Mission Streets,

San Francisco 1, California,

Attorneys for Appellee.

FILED

FEB - 9 1955

PAUL P. O'BRIEN,
CLERK

Subject Index

	Page
Jurisdiction	1
Statement of the Case	1
Specifications of Error.....	2
Question Presented	3
Argument	3

Table of Authorities Cited

Cases	Pages
Feeley v. Ragen, 166 F.2d 976.....	5
Foster v. Illinois, 332 U.S. 134	5
Powell v. Alabama, 287 U.S. 45.....	5
United States v. Hartenfeld, 113 F.2d 359.....	5
Weber v. Ragen, 176 F.2d 579.....	5

Rules

Federal Rules of Criminal Procedure, Rule 37(a).....	1
--	---

Statutes

18 United States Code, Section 111	1, 3
28 United States Code, Section 1291.....	1
28 United States Code, Section 2255.....	4

No. 14,548

IN THE

**United States Court of Appeals
For the Ninth Circuit**

WILLARD D. MCKINNEY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLEE.

JURISDICTION.

Jurisdiction of this appeal arises under Rule 37(a) of the Federal Rules of Criminal Procedure, Section 111, Title 18 United States Code, and Section 1291 of Title 28 United States Code.

STATEMENT OF THE CASE.

Appellant was indicted for assault with a dangerous weapon in violation of Title 18 United States Code, Section 111 (R. 2, 3). On April 23, 1954 appellant, an Alcatraz prisoner, was produced in Court pursuant to a writ of habeas corpus ad prosequendum (R. 4).

On that day Mr. George Hammer was appointed as attorney for appellant (R. 4). Appellant stated prior to this appointment that he was without means to employ counsel (R. 4). After the appointment of Mr. Hammer appellant informed the Court that he desired to obtain an attorney of his own choice (R. 5). On July 14, 1954 appellant, represented by Mr. John Adams and Mr. George Hammer, plead not guilty (R. 6). On August 23, 1954 appellant waived trial by jury and was tried by the Court on that date (R. 7, 9). After the government's case had concluded, appellant moved to set aside the waiver of jury trial, which motion was ordered denied, and further moved for a continuance (R. 11). This motion was also denied (R. 11).

Appellant introduced evidence and testified in his own behalf (R. 11). Five witnesses testified for the defense on August 25, 1954 (R. 12). On August 26, 1954 appellant was found guilty by United States District Judge Michael J. Roche (R. 13). After being sentenced to a term of five years, appeal was then taken to this Court (R. 15-18).

SPECIFICATIONS OF ERROR.

Appellant specifies as "grounds of appeal" the following:

1. The appellant has been denied and deprived of his rights to the due process of law, in that he was deceived and coerced by his counsel into

waiving his right to a trial by jury without his having proper knowledge of said right.

2. That his counsel, appointed by the Court, acted in a disinterested and unethical manner in their conduct of his defense. That is, both counsel being learned in the law, did willfully neglect to perform their duties in conducting a reasonable and proper defense for the appellant, and by their refusal to interview many of appellant's witnesses, necessary to his defense.

3. Appellant has also been denied the right to present vital argument upon the validity of the indictment, charging him with violation of Section 111, Title 18 U.S.C., and that his counsel arbitrarily neglected to argue said vital point of law and the acts in support thereof.

QUESTION PRESENTED.

1. Was appellant deprived of the effective right of counsel?

ARGUMENT.

Appellant was without means to employ an attorney (R. 4). The Court appointed Mr. George Hammer to represent him. Appellant then informed the Court that he desired to obtain an attorney of his own choice (R. 5). The record shows that an additional attorney represented appellant during the remainder of

the case (R. 6-16). The record further shows that appellant took the stand and testified in his own behalf (R. 11). In addition, some five witnesses testified for the defense (R. 12). A waiver of jury trial, signed by both appellant and his counsel was filed.

Appellant filed a brief in this Court on January 21, 1955. In this brief he makes some reference to Section 2255 of Title 28 United States Code. No motion under this section was filed in the District Court. The brief is numbered with the Court of Appeals number for the appeal from the judgment of conviction. We will interpret the brief as referring to his appeal from that judgment of conviction.

Appellant makes a number of vague assertions to the effect that he was misled by his attorneys. The only facts which he alleges consist of the following:

1. That the attorneys refused to subpoena witnesses.
2. That they refused to interview *many* of them.
3. That his attorneys informed some of the witnesses they could not be subpoenaed because the warden would not approve of their testimony.

It should be immediately apparent that witnesses did in fact testify for appellant. It appears that John Revense, Frank Davenport, John Green, Henry White and Carl Sunstrund testified in appellant's behalf (R. 12). Nothing appears of record which would indicate that appellant's attorneys either refused to interview any witnesses or refused to sub-

poena any witnesses. The record only reveals that appellant had the services of two presumably competent members of the bar. No facts are even alleged by appellant as to which of the attorneys did the things which he claims, or what they said, or what the names are of the witnesses he mentions, or what they would testify to, or what he said to his attorneys with reference to their testimony. Even assuming everything appellant says is true (despite the absence of any such facts in the record), the only inference presented to this Court is that some persons known by appellant were not interviewed or subpoenaed to testify in his defense.

While it is true that appellant is entitled under the Sixth Amendment to the effective right of counsel (*Powell v. Alabama*, 287 U.S. 45; *Foster v. Illinois*, 332 U.S. 134), unless legal representation is of such a low caliber as to amount to no representation at all the trial is not vitiated. *Feeley v. Ragen*, 166 F. 2d 976; *Weber v. Ragen*, 176 F. 2d 579; *United States v. Hartenfeld*, 113 F. 2d 359.

The facts of the present case do not indicate any lack of the effective right to representation by counsel. Appellant's statements about witnesses amount merely, if they amount to anything, to dissatisfaction with counsel. Appellant claims he was misled into waiving his right to trial by jury. However, he does not state any facts whatsoever to support this conclusion. The only inference presented to the Court is that he feels he was misled because the case was lost. Appellant seems blinded to the fact that the reason

the case was lost might very well be that he was guilty instead of any supposed lack of representation by counsel.

No error is alleged by appellant in his brief in the conduct of the trial. His vague allegations of misconduct on the part of his counsel are refuted by the record. That record reveals that counsel defended him in a trial which lasted four days and that they called five witnesses in his behalf. In our opinion, the present case is merely an example of a properly convicted criminal who is attempting to misrepresent facts to the Court in order to escape his just punishment. Counsel for this appellant, without compensation, worked hard and ably in his behalf. Now that the result, foreordained by his guilt, has occurred, he turns and bites the hand which was extended to help him.

We respectfully request that the judgment of conviction be affirmed.

Dated, San Francisco, California,
February 9, 1955.

LLOYD H. BURKE,

United States Attorney,

DONALD B. CONSTINE,

Assistant United States Attorney,

RICHARD H. FOSTER,

Assistant United States Attorney,

Attorneys for Appellee.